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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

21
SAU-SH

No. 691

T. C. SAUCIER,

Petitioner,

versus

STATE OF TEXAS,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES,**
**OCTOBER TERM, 1950.**

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**No. .....**

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**T. C. SAUCIER,**

**Petitioner,**

**versus**

**STATE OF TEXAS,**

**Respondent.**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.**

---

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, T. C. Saucier, prays that a *writ of certiorari* issue herein to review the final decision of the Court of Criminal Appeals of Texas, being the highest court of said State in which a decision could be had, the original opinion of said court having been rendered on the 22 day of February, 1950, (R. 66), and a motion for rehearing having been filed within

the time provided by the laws of said State, (R. 81), which motion was, after being entertained and considered by said court, overruled by a written opinion rendered on January 31, 1951 (R. 85). Both the original opinion and the opinion on the motion for rehearing are published in 235 S. W. 2d pages 903-916 (Advance Sheets February 27, 1951).

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## STATEMENT OF MATTER INVOLVED AND THE GROUNDS OF JURISDICTION.

Petitioner was indicted jointly with one David Beck for the alleged murder of one Gibbons on March 4, 1949, in Wichita County, Texas, (R. 1). Hon. W. W. Ballard, an attorney employed by Beck, was also employed by the relatives of petitioner to represent him, both defendants being represented in the trial in the District Court of Wichita County, Texas, by this attorney alone.

Article 711 of the Code of Criminal Procedure of Texas provides that persons charged as principals cannot be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others (Appendix-A). Article 650 of said Code provides that two or more defendants jointly prosecuted may sever in the trial upon the request of either. (Appendix-B.) Article 652 of said Code provides that if a severance is granted, the defendants may agree upon the order

in which they are to be tried, but if they fail to agree, the court shall direct the order of the trial (Appendix-C). And Article 653 of the same Code provides that the State's attorney may, at any time, under the rules provided in the Code, dismiss a prosecution as to one or more defendants jointly indicted with others; and the person so discharged may be used as a witness by either party. (Appendix-D.)

The attorney representing both defendants filed an affidavit of petitioner stating that the evidence of said Beck was material for petitioner, and requested that said Beck be first tried in order that petitioner might have the benefit of Beck's testimony should he be acquitted, and the motion for a severance was granted by the court (R. 1-2). And on the same day, petitioner and said Beck, through said attorney, filed a joint affidavit suggesting as the order of trial that Beck be first tried and that petitioner be tried second. (R. 2-3.) Whereupon, on the same day, and after the filing of said affidavits and requests as to the order of trial, the district attorney, with the approval of the court, dismissed the indictment against Beck in order that his evidence might be available to petitioner. (R. 3-4.)

Notwithstanding the indictment against Beck was dismissed, he was held in jail and subsequently re-indicted and convicted of the same offense and given a sentence of only five years. (R. 43.) As the attorney representing both defendants was expecting Beck to be first tried under the codal provisions referred to

above and as this attorney had not prepared for the trial of petitioner, said attorney filed a motion for a continuance which motion was overruled and the case against petitioner proceeded to trial. (R. 4-7.)

As will be shown by bill of exception No. 1, and more fully discussed hereafter, because Beck was kept under arrest and held in custody by order of the state officials after the indictment had been dismissed against him, the said attorney representing petitioner and Beck informed said Beck that he did not believe the indictment against Beck was dismissed in good faith, and that said Beck would be re-indicted for the same offense, and advised Beck not to testify for petitioner; that because of the situation brought about by the action of the State, the attorney representing petitioner and to whom he owed the duty of securing any and all evidence in his behalf, advised his other client, Beck, not to testify for petitioner, and petitioner was thus deprived of the benefit of the testimony of said Beck.

Petitioner was forced to trial, convicted and assessed the death penalty. (R. 7-8.) An appeal was taken by petitioner to the Court of Criminal Appeals of Texas, and the judgment of conviction was affirmed by that Court.

After the affirmance of said judgment of conviction assessing the death penalty against petitioner, his relatives secured the services of additional counsel who owed no duty to the other defendant, Beck, but

owed and owes a duty solely to petitioner who has been given a death penalty. A motion for a rehearing was filed on behalf of petitioner in the Court of Criminal Appeals of Texas within the time provided by the laws of that State, in which motion various assignments of error were urged, raising questions of denial of due process of law and the equal protection of the law under the Sixth and Fourteenth Amendments to the Constitution of the United States, in that by reason of the action of the State, and the divided allegiance of counsel to his clients, petitioner was deprived of material evidence in his behalf, will be caused to suffer unequal punishment as compared to that of his co-defendant, and did not have the undivided assistance of counsel to represent him in a capital case to which he was entitled under the due process of the Fourteenth Amendment to the Constitution of the United States, as will more fully appear by reference to assignment of errors numbered one to six, inclusive, in the motion for a rehearing. (R. 81-85.)

Petitioner shows that the said Court of Criminal Appeals of Texas held said motion for rehearing under consideration from the 12th day of April, 1950, on which date it was argued and submitted, to the 31st day of January, 1951, on which latter date said Court overruled said motion in a written opinion, and specifically passed on and over-ruled the constitutional question raised.

Petitioner shows that the action of the Court of Criminal Appeals of Texas in overruling his motion

for a rehearing on January 31, 1951, was the final action of said Court which could be taken in this cause, and the said Court of Criminal Appeals of Texas is the Court of last resort in that State in all cases of a Criminal nature prosecuted under the laws of Texas and is the highest court of said State in which a decision of this cause could be had under Section 5 of Article 5 of the Constitution of Texas (Appendix-E), and upon the overruling of petitioner's motion for a rehearing by said Court, its decision became final, and petitioner has no other recourse for relief from the death penalty against him unless said judgment is reversed by the Supreme Court of the United States. (Appendix-F.)

Petitioner contends that this Court has jurisdiction of this cause under Title 28 U. S. C., Section 1257 (3) giving this Court jurisdiction by writ of certiorari, "Where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." And paragraph 5 (a) Rule 38 of the Rules of the United States Supreme Court giving this court jurisdiction by certiorari, "where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decision of this court."

Where the action of the prosecuting officials of a state deprives the defendant of evidence in his favor or deprives him of full and effective assistance of

counsel (particularly in a capital case), the question of the denial of due process of law under the federal Constitution is presented, and the United States Supreme Court will take jurisdiction of the case. *Mooney v. Holohan, Warden,* 294 U. S. 103, 55 S. Ct. 340; *Gibbs v. Burke, Warden,* 337 U. S. 773, 69 S. Ct. 1247.

The right to the full assistance of counsel in a capital case is protected by the Fourteenth Amendment to the Federal Constitution. *Williams v. Kaiser, Warden,* 323 U. S. 471, 65 S. Ct. 363; *Hawk v. Olson,* 326 U. S. 271, 66 S. Ct. 116; *Powell v. Alabama,* 287 U. S. 45, 53 S. Ct. 55.

An accused does not have the full and undivided assistance of counsel where one counsel represents two or more defendants and they have conflicting interests. *Glasser v. United States,* 315 U. S. 60, 62 S. Ct. 457; *Wright v. Johnson, Warden,* 77 F. Supp. 687. And this is true whether counsel is appointed by the Court or engaged by the accused. *Wilson v. State,* 51 N. E. 2d 848, 222 Ind. 63; *Abraham et al. v. State,* 91 N. E. 2d 358.

While ordinarily the imposition of different penalties on two persons for the same crime does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, situations do arise, as in this case, where the punishments for the same crime are so unequal and discriminatory as to amount to a denial of the equal pro-

tection of the law as guaranteed by said Fourteenth Amendment, particularly where the discrimination arises from the actions of State officials and State laws. *Skinner v. Oklahoma*, 316 U. S. 535, 62 S. Ct. 1110; *Mitchell v. State*, 25 So. 2d 73, 157 Fla. 121.

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**QUESTIONS PRESENTED.**

1. Was petitioner deprived of due process of law and denied the equal protection of the law by the actions of the prosecuting officers of Texas in dismissing the indictment against Beck so as to make him available as a competent witness for petitioner under the statute, and at the same time preventing Beck from being a free witness by holding him under arrest and making an affidavit against him for the same crime during the trial of petitioner?

2. Was petitioner denied due process of law by reason of the fact that the attorney who represented both petitioner and his co-defendant, Beck, at the trial, could not and did not give petitioner that full assistaance of counsel to which he was entitled in a capital case, for the reason that the two defendants represented by the same counsel had conflicting interests which developed by reason of the actions of the prosecuting officers?

3. Was petitioner denied the equal protection of the law, in that he was given the death penalty, whereas, his co-defendant was given only five years

imprisonment for the same crime, the discrimination resulting from the actions of the officers of the State of Texas?

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## SPECIFICATION OF ERRORS TO BE URGED.

(1) The Court of Criminal Appeals of Texas was in error in its opinion on the motion for a rehearing in holding that the co-defendant, Beck, was a free witness after the indictment was dismissed against him, as the testimony of the trial judge himself, taken in connection with bill of exception No. 1, shows that the Judge ordered Beck arrested when he was offered as a witness for petitioner and refused to testify, the judge stating that Beck was arrested as a material witness, or because the court thought a "riot" or "bedlam" would take place in the courtroom, if Beck was permitted to go free during the trial of petitioner, and on the same day an affidavit was filed against Beck for the murder of the deceased Gibbons, (R. 65), and the said Court of Criminal Appeals erred in holding that these acts on the part of the state officials did not deny petitioner due process of law.

(2) The Court of Criminal Appeals of Texas was in error in holding on the motion for a rehearing that the action of the prosecuting officers in dismissing the indictment against Beck and at the same time keeping him under arrest did not deprive petitioner of the full benefit of counsel in contravention of the Sixth and

Fourteenth Amendment to the Federal Constitution, as the actions of the State officials created the situation which brought about the conflict in interest of petitioner and Beck represented by the same counsel.

(3) The Court of Criminal Appeals of Texas was in error in its opinion on the motion for a rehearing in holding that petitioner was not denied due process of law in not having the full and undivided representation of counsel, as the statements and findings of the Court as expressed in the opinion show that petitioner did not and could not have such full and undivided assistance of counsel where the admitted conflict of interest between petitioner and Beck existed and one counsel represented both conflicting interests.

(4) The Court of Criminal Appeals of Texas was in error in holding in its opinion on the motion for a rehearing that petitioner was not denied the equal protection of the law and would be subjected to unusual and cruel punishment because he received the death penalty and Beck, convicted of the same crime, received only five years imprisonment, as this discrimination resulted from the unfair actions of the State in the respects heretofore stated.

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**REASONS FOR GRANTING THE WRIT.**

If the conviction of petitioner under the circumstances above related is permitted to stand, not only

will petitioner lose his life without the benefit of a trial according to the fundamental principles of fairness and justice, but methods and proceedings will be approved which might deprive others of their life and liberty when convicted under similar circumstances. Briefly, petitioner urges that he is about to be deprived of his life without due process of law and without the equal protection of the law to which he is entitled as an American citizen under the Constitution of the United States for the following reasons:

(1) The provisions of the Code of Criminal Procedure of Texas (printed in the Appendix) gave petitioner the right to ask for a severance and he and his co-defendant, Beck, had a right to ask and did ask that Beck be tried first, and petitioner had a right to assume that the prosecuting officers would follow the law of Texas and first try said Beck. But, as is shown in the motion for a continuance (R. 4-7), petitioner was put to a great disadvantage on being forced to trial after the prosecuting attorney, with the approval of the court, dismissed the indictment against Beck and continued to hold him in jail, and on the same day Beck was called as a witness for petitioner, he was ordered held by the court and a charge was filed against him by the Sheriff for the same murder as was charged in the dismissed indictment.

The Court of Criminal Appeals of Texas conceded in its opinion on the motion for a rehearing (R. 86) that: "Appellant was entitled to Beck's testimony free from discredit by indictment or other form of ac-

cusation in connection with the murder." But the said Court erroneously held that at the time of the trial of petitioner, Beck was in no way discredited before the jury, and said Beck was in the same position he occupied before any charges had been filed against him in connection with the murder.

Reference to the statements of the trial judge alone will show that the state officials did not act in good faith and that Beck was not a free witness when he was called to testify. The trial judge on being asked if he ordered Beck arrested when Beck was called and refused to testify, made the unusual statement that he ordered the Sheriff to arrest or hold Beck while Beck was on the witness stand either as a material witness (although he had just refused to testify), or because the trial judge thought if Beck was allowed to go free (and there was then no charge against him) there might be a disturbance in the court room, or as the judge says in one part of his statement, he feared a "riot" or "bedlam" if Beck was permitted to walk out of the Courtroom (R. 35-37). The judge says that "things were pretty tense in here and the least little thing would have created probably a riot." (R. 37.) Moreover, just as soon as Beck left the witness stand he was taken back to jail, and the sheriff immediately made an affidavit against him for the murder of Gibbons, the same person he was charged with murdering in the dismissed indictment. (Tes. Sheriff R. 27 and affidavit R. 65.) How could Beck be a free witness under these circumstances? How could petitioner expect to get his testimony as a free witness, and

how could petitioner get a fair hearing in an atmosphere described by the trial judge?

The Court of Criminal Appeals of Texas stated in its opinion on the motion for a rehearing (R. 86) that the Court could not agree that the holdings of that Court to the effect that immunity from prosecution is not required in connection with the dismissal of an indictment violate the Fourteenth Amendment of the United States Constitution. Petitioner does not contend that the prosecuting officers of Texas should have promised Beck immunity, but he does contend that the state officers must act in good faith and not use the dismissal as a trap to frustrate petitioner's right to have the testimony of Beck as a free witness, and after the dismissal of the indictment Beck was a free man, yet he was not allowed to go free for one minute after the indictment against him was dismissed. As petitioner was deprived of the evidence by this action of the state officers, and as questionable proceedings were employed against petitioner, he has been denied due process of law under the federal Constitution. *Gibbs v. Burke, Warden,* 337 U. S. 773, 69 S. Ct. 1247; *Mooney v. Holohan, Warden,* 294 U. S. 103, 55 S. Ct. 340.

The Court of Criminal Appeals of Texas held in its opinion on rehearing (R. 88) that there is no showing as to what Beck's testimony would have been, or that it would have been favorable to petitioner. It would be pure speculation to assume that Beck's testimony would not have been favorable to petitioner. It is also

speculation to say that his testimony would not have influenced the jury, at least to the extent of giving petitioner imprisonment instead of the death penalty. The affidavits of Beck, Sheriff Vance, Deputy Hicks and petitioner (R. 11-15), introduced by the State in opposition to a new trial show that Beck was willing to testify for petitioner had he not been advised by the attorney representing petitioner and Beck not to testify.

(2) In order to meet the requirements of due process of law in capital cases and other serious crimes, the defendant is entitled to the effective and undivided assistance of counsel throughout his trial. *Hawks v. Olson*, 326 U. S. 271, 66 S. Ct. 116; *Williams v. Kaiser, Warden*, 323 U. S. 471, 65 S. Ct. 363; *Tomkins v. State of Missouri*, 323 U. S. 485, 65 S. Ct. 370; *Powell et al. v. Alabama*, 287 U. S. 45, 53 S. Ct. 55; *Uveges v. Commonwealth of Pennsylvania*, 335 U. S. 437, 69 S. Ct. 184.

The situation found by the Court of Criminal Appeals of Texas to have existed at the trial is convincing proof that petitioner did not have effective and undivided assistance of counsel, although petitioner was on trial for his life. In its original opinion (R. 80), the Court of Criminal Appeals of Texas said: "Appellant's attorney being also the attorney for Beck, was proffered the witness Beck free from the indictment. However, his duty to Beck seemed to have caused him to tell Beck that he thought the dismissal was a trick, and under such advice Beck refused to

testify unless granted immunity against ever being tried for this homicide. *This attorney seemed to be torn between two emotions, one his loyalty to appellant and his desire to have Beck's testimony, the other an effort to obtain immunity for Beck, also his client.*" (Italics supplied.)

How could petitioner receive the effective assistance of counsel under this situation found to exist by the Texas court? An attorney cannot serve two clients effectively where they have conflicting interests. It was not only to the interest of petitioner to have the testimony of Beck, which the attorney advised Beck not to give, but it was to the interest of petitioner to testify in his own behalf (which he desired to do), but was prevented from so testifying under the advice of this attorney, either for fear of prejudicing his other client, Beck, or for other reasons not known to petitioner. It is reasonable to conclude that the attorney representing both petitioner and Beck would be inclined to advise petitioner not to testify in his own behalf if his testimony might implicate his co-defendant, Beck, represented by the same attorney.

The United States Supreme Court held in the case of *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457, that the constitutional requirements of assistance of counsel are not met where one attorney represents two defendants whose interests conflict, and because of this conflict, the attorney does not produce all available evidence for fear it might prejudice the interest of the other defendant. This case has been followed

in many other cases, state and federal, holding that effective assistance of counsel is not given so as to meet the constitutional requirements where such conflicts exist. *Wright v. Johnson, Warden,* 77 F. Supp. 687; *Dillingham v. United States,* 76 F. (2d) 36; *People v. Bopp,* 116 N. E. 679; and in *California v. Lanigan et al.,* 140 P. (2d) 24, 148 ALR 176, the California court followed the principles announced by the United States Supreme Court in the *Glasser* case, *supra,* and held that a defendant is entitled to the undivided assistance of the attorney employed to represent him, the court making the following statement which is applicable to petitioner's situation: "In criminal cases it frequently occurs that circumstances which make it advisable for one defendant to testify are not present when consideration is given to the question of offering another defendant as a witness. One may be vulnerable to impeaching questions and the other not. It might be highly desirable that the one not so vulnerable take the witness stand and the other not. If the former should do so and the other not, the circumstances might weigh heavily against the latter in the minds of the jury. A like prejudice might not occur if the defendants were represented by separate counsel."

In overruling the constitutional question raised by petitioner in his motion for a rehearing on the ground that he did not have the undivided assistance of counsel in his defense, the Court of Criminal Appeals stated that petitioner only was on trial and was represented by counsel of his choosing. This holding is effectively answered in that neither petitioner nor his

relatives who employed this counsel had any reason to believe that the prosecuting officers would not follow the law of Texas and try Beck first as requested and as petitioner had a right to expect. The situation of the conflict was brought about by the actions of the officials, which actions petitioner could not anticipate. The fact that petitioner only was on trial did not and could not lessen the inconsistent position in which counsel was placed as he was then counsel for Beck who was later tried and convicted. Moreover, a defendant is entitled under due process to have full representation of counsel without divided allegiance whether counsel is employed by him or his relatives or is appointed by the court. *Hall v. Ragen*, 60 F. Supp. 820; *Wilson v. State*, 51 N. E. 2d 848, 222 Ind. 63; *Abraham et al. v. State* 91 N. E. 2d 358.

(3) In overruling the contention of petitioner for a rehearing on the ground that he was denied the equal protection of the law in that he was given the death penalty, whereas his co-defendant was given only five years imprisonment for the same crime, the Court of Criminal Appeals of Texas held that the penalties were assessed by different juries and the penalty in each case was within the range of the jury. Beck's trial was scheduled for the same jury which tried petitioner, yet through the actions of the state officers, related above, Beck's trial was not only carried over from that jury, but he was not re-indicted by the first grand jury that re-convened after petitioner's trial and before his motion for a new trial was overruled. It is not reasonable to speculate that, if Beck had

been tried first by the same jury *venire* which tried petitioner, as would have been the regular procedure, there would have been this invidious discrimination in the penalties assessed, even though both had been convicted. *Skinner v. Oklahoma*, 316 U. S. 535, 62 S. Ct. 1110.

WHEREFORE, petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas in this cause, and in due course that said judgment be reversed, and petitioner be granted a new trial for the protection of his constitutional rights in the premises.

Respectfully Submitted,

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**CERTIFICATE.**

This is to certify that copies of this brief have been served on opposing counsel on this .... day of April, 1951.

.....

## APPENDIX.

### From Code of Criminal Procedure of Texas

A

"Art. 711. Principals, accomplices or accessories.—Persons charged as principals, accomplices or accessories, whether in the same or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others."

B

"Art. 650. Severance.—Two or more defendants jointly prosecuted may sever in the trial upon the request of either."

C

"Art. 652. Order of Trial.—If a severance is granted, the defendants may agree upon the order in which they are to be tried, but if they fail to agree, the court shall direct the order of the trial."

D

"Art. 653. May dismiss to use witness.—The State's attorney may, at any time, under the rules provided in this Code, dismiss a prosecution as to one or more defendants jointly indicted with others; and the person so discharged may be used as a witness by either party."

**From Section 5, Art. 5—Constitution of Texas.**

E

"Art. V, Sec. 5—The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law."

F

**From Code of Criminal Procedure of Texas.**

"Art. 819. Receipt of Mandate.—When the clerk of any court from whose judgment an appeal has been taken in felony cases wherein bail has been allowed shall receive the mandate of the Court of Criminal Appeals affirming such judgment, he shall immediately file the same and forthwith issue a capias for the arrest of the defendant for the execution of the sentence of the court, which shall recite the fact of conviction, setting forth the offense and the judgment and sentence of the court, the appeal from and affirmance of such judgment and the filing of such mandate, and shall command the sheriff to arrest and take into his custody the defendant and place him in jail and therein keep him until delivered to the proper penitentiary authorities, as directed by said sentence. The sheriff shall forthwith execute such capias as directed."

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OCTOBER TERM, 1950

No. 691

T. C. SAUCIER,
*Petitioner*

*v.*

STATE OF TEXAS,
*Respondent*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

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No.

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T. C. SAUCIER,
*Petitioner*

*v.*

STATE OF TEXAS,
*Respondent*

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### PRELIMINARY STATEMENT

Petitioner was charged by indictment and convicted of murder with malice aforethought in the 30th District Court of Wichita County, Texas. Upon appeal to the Court of Criminal Appeals of Texas, the conviction was affirmed and a motion for rehearing overruled.[1]

Petitioner assigns as error certain alleged violations of the Federal Constitution, as follows: (1) a denial of due process of law in connection with the procedure followed by the State in the trial of this

[1] *Saucier v. State*, 235 S. W. 2d 903 (1951).

cause; (2) a denial of the effective assistance of counsel; and (3) a denial of equal protection of the laws and the infliction upon him of a cruel and unusual punishment.

It is respectfully submitted that this case is not a proper one for review by certiorari in this Honorable Court. Petitioner's rights under the Federal Constitution have in no way been invaded. The principles of law set forth in his petition for certiorari are eminently correct, and with them we do not take issue. However, the problem with which we are confronted is not that of a formulation of rules of law, which are already well established. It involves rather a determination of the applicability of these established rules to the facts reflected in the record of this case. We cannot agree that the instant facts bring petitioner's case within the rules of law which he has submitted.

The uncontroverted facts of this case indicate that petitioner is guilty of an atrocious crime; he beat to death a man who was entrusted to his care. He was duly charged with murder, given a fair trial in which he was ably represented by an attorney of his own choosing, and found guilty by a jury. He was assessed a penalty appropriate to the crime he committed; a penalty called for by a Texas statute, the validity of which has never been questioned.

The record of this case clearly demonstrates that petitioner was extended every privilege to which he was entitled under both State and Federal law. Therefore, it is respectfully submitted that his petition for certiorari should be denied.

## STATEMENT OF THE CASE

The facts of this case reflect an unprovoked, wholly unjustified and willful killing of an inmate of a State psychopathic hospital by an employee of that institution. Thomas Houston Gibbons, the deceased, was declared insane and taken to the State Hospital at Wichita Falls, Texas. Upon his arrival he was delivered to petitioner, a ward attendant, to be bathed and clothed. When they entered the dressing room, petitioner directed the deceased to remove his clothes. As Gibbons began to fumble with his collar, petitioner, without provocation, struck him in the stomach. He was soon knocked down by petitioner, who then proceeded to kick, stomp, and strike deceased with his fists. David Beck, another hospital attendant, joined petitioner and assisted him in beating Gibbons to death.

At length the two seemed to realize the seriousness of Gibbons' condition. They dragged him into an adjoining bathroom and attempted to revive him by placing him in a tub and splashing water in his face. Failing in this effort, they removed Gibbons to another room, where he soon died. The physician who performed the autopsy testified, among other things, that Gibbons' large intestine had been severed just below its juncture with the stomach. (R. 80, 81.)

Petitioner and Beck were jointly indicted for murder with malice aforethought. (R. 1.) W. W. Ballard, the attorney employed by Beck, was also employed by petitioner.

Ballard filed a motion for continuance, requesting that Beck be tried first. (R. 1, 2.) As grounds for

this motion, it was alleged that Beck's testimony would be material to the defense of petitioner, and that it was thought he could not be convicted. Thus they hoped to have Beck rendered available as a witness at the subsequent trial of petitioner.[2] The motion for severance was granted. Thereupon, the prosecution, with the approval of the Trial Judge, dismissed all charges against Beck in order that his testimony be made available to petitioner. A motion for continuance (R. 4-7.) was overruled, and petitioner's trial was begun.

At the trial, Beck was placed on the witness stand but refused to testify. Upon being asked whether he feared self-incrimination as a result of what he might say, Beck answered that he did not. (R. 24.) *He stated that he refused to testify because he was not promised immunity from another indictment and subsequent prosecution.* (R. 24.) He was advised by his attorney as to the legal effect of the dismissal of charges against him, i.e., that he was a free man. (R. 22.) The courtroom was crowded and the audience tense. Beck was nervous and, at the conclusion of his interrogation, appeared as though he might run out of the courtroom. Anticipating a possible riot or other disturbance, the Trial Judge ordered Beck held. (R. 36-39.) Not having demonstrated a legal ground for his refusal to testify, Beck was held as a material witness.

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[2] Article 711, Texas Code of Criminal Procedure (Vernon 1948), provides that persons charged as principals may not be introduced as witnesses for each other, unless one is acquitted by a separate trial or the prosecution against him is dismissed. See Appendix, p. 16 for applicable Texas severance statutes.

The trial proceeded and petitioner found guilty as charged, his penalty being assessed by the jury at death by electrocution. (R. 7, 8.) It is interesting to note that nowhere in the record can there be found any objection made by Ballard as to ethical problems resulting from his joint representation of petitioner and Beck. A motion for new trial was made, and after a hearing thereon, overruled.

Later, Beck was again charged with the murder of Gibbons. This complaint was filed by the Sheriff of Wichita County, not by the District Attorney (R. 27.) He was subsequently tried and convicted, the jury assessing his punishment at five years in the State Penitentiary. (R. 86.) Petitioner's conviction was affirmed and a motion for rehearing overruled by the Texas Court of Criminal Appeals,[3] the court of last resort for criminal matters in Texas. A petition for stay of execution was granted in order that a petition for certiorari might be filed in the Supreme Court of the United States.

## POINT ONE

The dismissal of the indictment against petitioner's co-defendant and subsequent separate trial of petitioner did not constitute a denial of due process of law.

### Argument and Authorities

Petitioner complains of the holding of the Court of Criminal Appeals that David Beck was a free witness in the trial of this cause. After the Trial Court,

[3] *Saucier v. State, supra.*

in response to the motions of petitioner and his co-defendant, had allowed the severance and ordered that Beck be tried first, the State, with the approval of the Trial Court, dismissed all charges against Beck. The dismissal was made in order that Beck be made available as a witness for petitioner. (R. 3.) It is asserted that this dismissal was not made in good faith. We cannot agree with that contention.

It is provided in the Texas Code of Criminal Procedure (Vernon 1948)[4] that the State's attorney may at any time dismiss charges against one or more defendants jointly indicted with others. The incompetency of a witness is removed, and thus he may testify for either side. This is a common practice throughout the United States.[5] However, the person against whom the indictment has been dismissed may not thereafter claim immunity from further prosecution.[6] He may refuse to testify because of a fear of self-incrimination, but he may not demand a promise of immunity in exchange for his testimony.

However, the Court of Criminal Appeals has upon numerous occasions reversed cases in which it appeared that the dismissal had been made in bad faith.[7] Thus it is evident that in Texas the dismissal doctrine is qualified by the principle that the dismissal must be made in good faith.

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[4] Articles 653 and 711.

[5] 22 C. J. S. 1370, 1381, *Criminal Law*, Secs. 801, 804.

[6] *Jones v. State*, 214 S. W. 322 (1919); *Hobbs v. State*, 112 S. W. 308 (1908); *Brown v. State*, 58 S. W. 131 (1900).

[7] *Smith v. State*, 116 S. W. 572 (1909); *Follis v. State*, 78 S. W. 1069 (1904); *Manor v. State*, 77 S. W. 786 (1903).

Petitioner asserts, contrary to the finding of the Court of Criminal Appeals, that the dismissal as to Beck was not made in good faith. In Texas, the District Attorney and District Judge are public officers. Being such, there is a presumption of the validity and legality of their actions, which petitioner has failed to rebut.

Petitioner complains of the fact that, after Beck refused to testify, he was ordered held by the Court. The Trial Judge has quite adequately explained his actions. (R. 36-38.) There was considerable excitement evidenced both by the witness Beck and the spectators at the trial. The Judge was afraid that Beck, after testifying, might run out of the courtroom. This, he feared, would cause considerable disorder and so he ordered the Sheriff to hold Beck as a material witness.

The Judge was correct, not only in maintaining order in his Court, but also in holding Beck as a material witness. The charges against Beck had been dismissed. Therefore he was available as a witness and in no way discredited before the jury. He evidenced no fear of self-incrimination. He simply demanded immunity, to which he was not entitled, as the price for his testimony. He was a material witness who refused to testify, one who could be punished by the Court for his recalcitrance. The Court therefore ordered him held, not on another murder charge, but as a material witness. Such circumstances certainly cannot be held to constitute bad faith on the part of either the Trial Judge or the District Attorney.

Petitioner also complains of the fact that Beck

was subsequently charged and convicted of murder. The second complaint was filed by the Sheriff. Nowhere in the record is it shown that this was done as a result of connivance with the prosecuting attorney. The Sheriff, on his own violition, signed the second complaint. (R. 27.) How could the independent action of the Sheriff possibly indicate bad faith on the part of the District Attorney?

Beck was subsequently tried and convicted of murder. He was sentenced to five years in the State Penitentiary. Petitioner here seeks a new trial because he was deprived of any benefit he might have received from Beck's testimony. Such testimony cannot be forthcoming in any future trial, Beck having since been convicted of the same offense and his competency as a witness thereby removed. It is well settled that a Court will not take any useless action. Why, then, should this case be reversed in order to grant petitioner the benefit of testimony which cannot be used?

The law regarding the effect of the Fourteenth Amendment upon State judicial proceedings is quite clear. It does not limit the power of the State to deal with crimes committed within its borders, "and it was not intended to bring to the test of a decision of this Court every ruling made in the course of a state trial."[8]

Another description of the effect of the Fourteenth Amendment upon the criminal judicial process of a State is provided in the case of *Minder v. Georgia*:

> "The requirements of the Fourteenth Amendment are satisfied if the trial is had according to

[8] *Avery v. Alabama*, 308 U.S. 444, 446, 447 (1940).

> the settled course of judicial procedure obtaining in the particular State, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government.'"[9]

A state is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness without infringement of the due process clause, unless some fundamental principle of justice has been violated.[10] There was no violation of any such principle during the trial of petitioner's case.

**POINT TWO**

Petitioner was not deprived of the effective assistance of counsel.

**Argument and Authorities**

The law respecting the right of an accused to counsel is well established. The Fourteenth Amendment requires that a State furnish counsel to all persons charged of serious crimes, when it is necessary for their adequate defense.[11] A denial of the *effective* assistance of counsel likewise results in a denial of due process of law.[12] These principles are recognized and followed by the Texas Court of Criminal Ap-

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[9] 183 U.S. 559, 562 (1902).

[10] *Carter v. Illinois*, 329 U.S. 173 (1946); *Avery v. Alabama, supra; Brown v. Mississippi*, 297 U.S. 278 (1936); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

[11] *Uveges v. Pennsylvania*, 335 U.S. 437 (1948).

[12] *Powell v. Alabama*, 287 U.S. 45 (1932).

peals.[13] We are familiar also with the rule forbidding the appointment of a single attorney to simultaneously represent joint defendants whose interests are in conflict.[14] However, the point at issue is not the law applicable to this problem, but the application of the appropriate rules to the facts in this record.

Petitioner contends that he did not have the effective and undivided assistance of counsel during his trial. It is asserted that the attorney on behalf of petitioner was anxious to obtain the testimony of Beck, but was prevented from doing so because of his duty to protect Beck from further prosecution. Petitioner has cited several cases in which convictions were reversed because one attorney was forced to represent two or more defendants whose interests were in conflict.[15] We fully agree with the principles of law thus adduced, but they simply do not control petitioner's case. For example, two of the decisions to which our attention has been directed are instances of a single attorney being appointed to represent several co-defendants, one of whom was accused of guilt by the others.[16] Certainly the interests of such defendants are in conflict, but it is impossible by any stretch of the imagination to find an

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[13] *Parsons v. State*, 218 S. W. 2d 202 (1949).

[14] *Glasser v. United States*, 315 U.S. 60 (1942).

[15] *Glasser v. United States, supra; Dillingham v. United States*, 76 F. 2d 36 (1935); *Wright v. Johnson*, 77 F. Supp. 687 (1948); *Hall v. Ragen*, 60 F. Supp. 820 (1945); *Abraham v. State*, 91 N. E. 2d 358 (Ind. 1950); *Wilson v. State*, 51 N. E. 2d 848 (Ind. 1943); *People v. Lanigan*, 140 P. 2d 24 (Calif. 1943), 148 A. L. R. 176; *People v. Bopp*, 116 N. E. 679 (Ill. 1917).

[16] *People v. Bopp, supra; Wright v. Johnson, supra.*

indication of such incompatibility in the record of this case.

It is well settled that a single attorney may simultaneously represent two or more joint defendants whose interests are not conflicting. [17] There was but one defendant in the trial of the present case. Petitioner alone was on trial. At that trial, petitioner's attorney raised no objection that he felt disqualified to proceed because of any divided allegiance as between petitioner and Beck. The issue was never raised until a motion for rehearing was made in the Court of Criminal Appeals, after the conviction had been affirmed. A statement made by the Court in *United States v. Rollnick* aptly summarizes the instant situation:

> "The attorney was familiar with the case, and *any suggestion that there was a conflict of interest is an absurd afterthought.*" (Emphasis supplied.) [18]

Petitioner was ably represented by counsel of his own choosing. He was fairly tried, in full accord with all fundamental principles of justice. He was tried alone, not in conjunction with others whose defenses were incompatible with his own. There is no showing that he would have benefited by the use of Beck's testimony. On the contrary, the record

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[17] *Sanders v. United States*, 183 F. 2d 748 (1950); *Setser v. Welch*, 159 F. 2d 703 (1947), cert. den. 331 U.S. 840 (1947); *Farris v. Hunter*, 144 F. 2d 63 (1944); *United States v. Rollnick*, 91 F. 2d 911 (1937); *Collingsworth v. Mayo*, 85 F. Supp. 207 (1949); *People v. Rocco*, 285 P. 704 (Calif. 1930); *People v. Courtney*, 138 N. E. 857 (Ill. 1923); *Fambles v. State*, 25 S. E. 365 (Ga. 1896).

[18] *Supra*, p. 916.

(Affidavits, R. 11-15.) clearly indicates that Beck was told to remain silent because it was feared that his testimony would prove harmful to petitioner.[19] Even if we charitably assume that such testimony would have been useful to petitioner, it will not be available at a future trial because of the subsequent conviction of Beck.

The rule that a State is free to deal with crimes according to its own concepts of social policy and justice[20] is applicable to cases in which a question is raised regarding the adequacy of counsel. In this respect it was said by this Court in *Avery v. Alabama*:

> "In determining whether petitioner has been denied his constitutional right to assistance of counsel, we must remember that the Fourteenth Amendment does not limit the power of the States to try and deal with crimes committed within their borders, and was not intended to bring to the test of a decision of this Court every ruling made in the course of a state trial. Consistently with the preservation of constitutional balance between state and federal sovereignty, this Court must respect and is reluctant to interfere with the states' determination of local social policy."[21]

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[19] Regarding plans for the possible use of Beck as a witness, petitioner made, under oath, the following statement:

> "Mr. Ballard told me that we could not afford to put David Beck on the stand as a witness in my case, because we couldn't tell what he might swear to, and that his evidence might hurt us." (R. 15.)

[20] Citations at note 10, *supra*.

[21] *Supra*, pp. 446, 447.

## POINT THREE

Petitioner was not deprived of equal protection of the laws, nor was he subjected to a cruel and unusual punishment.

### Argument and Authorities

Petitioner assigns as error the disparity of the sentences imposed upon himself and Beck. Since he received a more severe penalty than his co-defendant, petitioner asserts that he was denied equal protection of the laws and subjected to a cruel and unusual punishment, in violation of the Federal Constitution.

The case upon which petitioner relies[22] is not in point. The equal protection clause was designed to prohibit legislation which unreasonably penalizes or otherwise discriminates against a particular class or group. A State statute was declared unconstitutional in *Skinner v. Oklahoma* because it contained just such a discriminatory feature. There is no such "invidious discrimination" to be found in the record before us.

The comparative gravity of criminal offenses committed within a State is a matter for the State to determine. The equal protection clause requires that a penal statute operate uniformly upon the inhabitants of the State enacting it.[23] It does not require Courts to impose similar sentences under statutes allowing discretion in the degree of punishment to be imposed for a particular offense. Equal protection is not violated if the sentence imposed is within

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[22] *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
[23] *Ibid.*

statutory limits.[24] Regarding the discretion of State Courts in the imposition of punishments for a given crime, this Court said:

> "To establish appropriate penalties for the commission of a crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the law-making power, are functions peculiarly belonging to the several states; . . ."[25]

"Cruel and unusual punishment" usually implies something barbarous and inhumane.[26] It does not embrace the imposition of prison sentences or capital punishment. This Court has squarely held that the infliction of the death penalty by means of the application of electricity is not a violation of the constitutional provision.[27] Where the sentence imposed is within the limits prescribed by statute, it will not be regarded as cruel and unusual.[28]

It is evident that petitioner has not been denied equal protection of the laws, nor has the Court meted out to him a cruel and unusual punishment. The applicable Texas statute[29] allows the courts a wide

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[24] *Collins v. Johnson,* 237 U.S. 502 (1915); *Howard v. Fleming,* 191 U.S. 126 (1903).

[25] *Collins v. Johnson, supra,* p. 510.

[26] *In re Pinaire,* 46 F. Supp. 113 (1942).

[27] *In re Kemmler,* 136 U.S. 436 (1890).

[28] *Hemans v. United States,* 163 F. 2d 228 (1947), cert. den. 332 U.S. 801 (1947); *Moore v. Aderhold,* 108 F. 2d 729 (1939).

[29] Article 1257, Texas Penal Code (Vernon 1948) provides:

> "The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two."

degree of discretion in the imposition of punishments for murder. Each case stands upon its own particular facts, and it would be grossly unjust to impose inflexibly the same punishment upon each person so convicted. Both petitioner and Beck have received sentences within the limits of that statute. They were tried separately, by different juries who imposed upon each the punishment they deemed appropriate. Petitioner is not the victim of some discriminatory statute penalizing him for certain acts which are not made criminal if committed by others. Neither is he the victim of a punishment disproportionate to the crime of which he was found guilty. Petitioner was fairly tried and convicted of murder. In accordance with Texas law, he was sentenced to death by electrocution. This was neither a denial of equal protection of the laws nor the imposition of a cruel and unusual punishment.

## CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court and the petition for writ of certiorari should be denied.

PRICE DANIEL
Attorney General of Texas

CALVIN B. GARWOOD, JR.
Assistant Attorney General

May, 1951.

## APPENDIX

### TEXAS STATUTES REGARDING SEVERANCE

*Texas Code of Criminal Procedure* (Vernon 1948):

Article 650. Severance.

> "Two or more defendants jointly prosecuted may sever in the trial upon the request of either."

Article 652. Order of trial.

> "If a severance is granted, the defendants may agree upon the order in which they are to be tried, but if they fail to agree, the court shall direct the order of the trial."

Article 653. May dismiss to use witness.

> "The State's attorney may, at any time, under the rules provided in this Code, dismiss a prosecution as to one or more defendants jointly indicted with others; and the person so discharged may be used as a witness by either party."

Article 711. Principals, accomplices or accessories.

> "Persons charged as principals, accomplices or accessories, whether in the same or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others."